United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1934.

No. 6230

557

MARTIN ROTH, APPELLANT,

vs.

ROBERT C. BALDWIN, RECEIVER COMMERCIAL NATIONAL BANK OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 21, 1934.

PRINTED JULY 11, 1934.

Court of Appeals of the District of Columbia

APRIL TERM, 1934.

No. 6230

MARTIN ROTH, APPELLANT,

vs.

ROBERT C. BALDWIN, RECEIVER COMMERCIAL NATIONAL BANK OF WASHINGTON, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia

No. 6230.

MARTIN ROTH, Appellant,

vs.

ROBERT C BALDWIN, Receiver, Commercial National Bank of Washington.

a Supreme Court of the District of Columbia.

At Law.

No. 82882.

ROBERT C. BALDWIN, Receiver, Commercial National Bank of Washington, Plaintiff,

vs.

MARTIN ROTH, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed June 27, 1933.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

At Law.

No. 82882.

ROBERT C. BALDWIN, Receiver, Commercial National Bank of Washington, Plaintiff,

vs.

MARTIN ROTH, Defendant.

The plaintiff, Robert C. Baldwin, as Receiver of the Commercial National Bank of Washington, a corporation or-

ganized and existing under the National Banking Laws of the United States, sues the defendant, Martin Roth, for money payable to the plaintiff by the defendant in the sum of Sixteen Thousand Seven Hundred ($16,700) Dollars, for that the plaintiff on the 28th day of February, 1933, was duly appointed Receiver of the said Commercial National Bank of Washington by the Acting Comptroller of the Currency of the United States, under the authority vested in said Acting Comptroller by the statutes of the United States, and thereupon the plaintiff duly qualified as Receiver thereof and since that date has been and is now acting in the performance of his duties; that on the 28th day of February, 1933, and at all times hereinafter mentioned the said Commercial National Bank of Washington had a paid up capital stock of One Million ($1,000,000) Dollars, consisting of ten thousand (10,000) shares of a par value of One Hundred ($100) Dollars each.

And for that, on the 25th day of March, 1933, the Acting Comptroller of the Currency determined that in order
2 to pay the debts of said Commercial National Bank it was necessary to enforce the individual liability of the stockholders therefor, and by virtue of the authority vested in him by law, the said Acting Comptroller of the Currency on said date last named made an assessment and requisition upon all of the shareholders of record of the said Commercial National Bank of Washington for the sum of One Million ($1,000,000) Dollars, that amount constituting an assessment of one hundred (100%) per cent of the par value of all of the shares of the capital stock of said bank, to be paid by said shareholders on or before the 1st day of May, 1933; and at the same time the said Acting Comptroller of the Currency made demand upon each and every one of the shareholders of said Commercial National Bank of Washington for the payment of a sum equal to the par value of each and every share of the capital stock of said Commercial National Bank of Washington, held or owned by them respectively at the time of the failure of said bank, and directed the plaintiff as Receiver of said bank to take all necessary proceedings, by suit or otherwise, to enforce to that extent said individual liability of said shareholders.

And for that, at the date of the suspension of said Commercial National Bank of Washington, to-wit, on the 28th day of February, 1933, the defendant, Martin Roth, was

the owner of one hundred sixty-seven (167) shares of the capital stock of said Commercial National Bank of Washington, then and there registered in his name on the books of said bank, of the par value of One Hundred ($100) Dollars per share; that the said defendant was duly notified of said assessment, and payment demanded of him, in accordance with the statute in such cases made and provided, and the Particulars of Demand hereto attached; that although payment of the sum of Sixteen Thousand Seven Hun-
3 dred ($16,700) Dollars, with interest thereon from the 1st day of May, 1933, has been demanded from the said defendant, yet the said defendant has failed to pay and still refuses to pay the said sum or any part thereof.

Wherefore, by reason of the premises, the plaintiff claims of the defendant, Martin Roth, the sum of Sixteen Thousand Seven Hundred ($16,700) Dollars, together with interest thereon at six (6%) per cent per annum from the 1st day of May, 1933, besides the costs of this suit.

SHERLEY, FAUST & WILSON,
By C. F. WILSON,
Attorneys for Plaintiff.

Filed on behalf of:
ROBERT C. BALDWIN,
Receiver,
Commercial National Bank of Washington.

Affidavit of Merit.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Robert C. Baldwin, being duly sworn according to law, on oath deposes and says that he is the plaintiff above named; that he has personal knowledge of the facts hereinafter set forth; that he is duly authorized to make this Affidavit.

Affiant avers that defendant is indebted unto plaintiff for money payable to the plaintiff by the defendant in the sum of Sixteen Thousand Seven Hundred ($16,700) Dollars, for that the plaintiff was duly appointed Receiver of the Commercial National Bank of Washington, a corporation as aforesaid, by the Acting Comptroller of the Currency of

the United States, under the authority vested in said
4 Acting Comptroller by the Statutes of the United
States; and for that the said Acting Comptroller of the Currency on, to-wit, the 25th day of March, 1933, by virtue of the authority vested in him, did make an assessment and requisition upon the shareholders of the aforesaid, the Commercial National Bank of Washington, for One Million ($1,000,000) Dollars, to be paid by them on or before the 1st day of May, 1933; and for that, the said Acting Comptroller of the Currency did thereby make a demand upon each and every one of the said shareholders of the said, the Commercial National Bank of Washington, for the par value of each and every share of the capital stock of the said Bank held or owned by them, respectively; and the said Acting Comptroller of the Currency did thereby direct Robert C. Baldwin, Receiver for the said corporation, heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

And for that, the said defendant was the owner of one hundred sixty-seven (167) shares of the stock of the said, the Commercial National Bank of Washington, then and there standing in his name, of the par value of One Hundred ($100) Dollars per share; that the said defendant was duly notified of the said assessment in accordance with the statute in such case made and provided; that, although payment of the sum of Sixteen Thousand Seven Hundred ($16,700) Dollars, with interest thereon from the 1st day of May, 1933, has been demanded from the defendant, yet the said defendant fails and refuses to pay the said sum or any part thereof, and there is justly due and owing from the said defendant to the plaintiff the sum of Sixteen Thousand
Seven Hundred ($16,700) Dollars, with interest
5 thereon at the rate of six (6%) per cent per annum
from May 1, 1933, besides the costs of this suit, exclusive of all set-offs and just grounds of defense.

ROBERT C. BALDWIN.

Subscribed and sworn to before me this 9th day of June, 1933.

[NOTARIAL SEAL.] BENJAMIN ROBINSON,
Notary Public, D. C.

Particulars of Demand.

Assessment Upon Shareholders.

Treasury Department, Office of the Comptroller of the Currency.

No. 7446.

In the Matter of THE COMMERCIAL NATIONAL BANK OF WASHINGTON, DISTRICT OF COLUMBIA.

Washington, D. C., March 25, 1933.

To all whom it may concern:

Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Commercial National Bank of Washington, District of Columbia, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Section 5151 and 5234 of the Revised Statutes of the United States, Section 1c, 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The Commercial National Bank of Washington," for One Million ($1,000,000) Dollars, to be paid by them on or before the first day of May, 1933, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned
6 by them, respectively, at the time of its failure; and I hereby direct Robert C. Baldwin, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at

the City of Washington, in the District of Columbia, this twenty-fifth day of March, A. D. 1933.

[SEAL.] F. G. AWALT,
Acting Comptroller of the Currency.

Office of Receiver, The Commercial National Bank of Washington, District of Columbia.

Washington, D. C., March 29, 1933.

You will please take notice, That the Comptroller of the Currency has, on March 25, 1933, levied an assessment upon the Stockholders of The Commercial National Bank of Washington, District of Columbia, of one hundred per cent of the par value of each and every share, payable at the office of the Receiver, on or before May 1, 1933. The Receiver is, however, authorized by the Comptroller of the Currency to grant an extension, without interest, to shareholders who pay 25 per cent of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before June 1, 1933, 25 per cent additional on or before July 1, 1933, and the remaining 25 per cent on or before August 1, 1933.

Deferred payments will bear interest after May 1, 1933, at the legal rate in the District of Columbia except that interest may be abated in the case of any Shareholder who pays one-fourth of his assessment on or before May 1, 1933, and who pays the remaining installments on or before the dates at which they mature under the terms of the extension.

You are therefore required to pay the assessment of $100 per share on the 167 shares of Stock standing in your name and in accordance with the foregoing order and this notice. Your prompt compliance will be of great benefit to creditors of this trust and advance materially its early liquidation.

ROBERT C. BALDWIN,
Receiver,
The Commercial National Bank of Washington,
District of Columbia.

7 To Mr. Martin Roth,
234 12th St. S. E.,
Washington, D. C.

NOTE: All checks in payment of the stock assessment should be drawn payable to the order of Robert C. Baldwin, Receiver.

Amount of Assessment $16,700.00.

Memoranda.

July 21, 1933.—Demurrer to Declaration filed.

September 15, 1933.—Demurrer to Declaration overruled.

Amended Pleas.

Filed November 23, 1933.

* * * * * * *

First Plea: The defendant, Martin Roth, for a plea to the declaration filed in the above entitled cause denies that he is indebted to the plaintiff in the amount claimed or in any other sum and denies that plaintiff, as receiver, is authorized by law to maintain this action and denies that the assessment and requisition alleged upon the shareholders was legally made or is legally enforceable and further denies that said assessment is required in order to pay the debts of said Commercial National Bank. He denies that lawful demand was made upon the defendant for the payment of said assessment. He admits that he was the owner of one hundred sixty-seven (167) shares of capital stock in said bank but denies that he was duly notified of said assessment and payment in accordance

8 with the Statute in such case provided.

Defendant denies all other allegations herein not specifically admitted.

Second Plea: For a further plea to said declaration, defendant says that the plaintiff as said receiver is justly indebted unto the defendant in the sum of $26,441.39, being the amount of balance on deposit belonging to this defendant in said bank at the time of the appointment of the Receiver thereof and at the time of the alleged assessment for stock liability. Defendant further says that cash dividends totalling fifty per cent (50%) have been declared to depositors by said Receiver whereby the defendant be-

came and is entitled to receive from the plaintiff the sum of $13,220.69 in cash, with interest from the date of the said declarations of dividends. Defendant further says that the aforesaid amount has been demanded of the plaintiff by the defendant, but that said plaintiff has wholly refused to pay the same. Defendant says that in violation of his said right to the aforesaid amount of dividends, said plaintiff has affirmatively asserted a legal right to set-off the said cash dividends, together with future dividends which said plaintiff will declare and said plaintiff has insisted upon his alleged right of set off for the purpose of setting off said dividends against the claim set forth in plaintiff's declaration and for the purpose of diminishing the same. Defendant therefore says that the plaintiff's said refusal to deliver unto the defendant the aforesaid amount of cash dividends declared by the said plaintiff and payable to the depositors in said bank and in asserting said plaintiff's alleged right of set off as said Receiver, that the said plaintiff is forever estopped to deny the right of this defendant to set off against the
9 amount claimed in the plaintiff's declaration, the total amount of $26,441.39, being the balance on deposit of the said defendant with the plaintiff, which said balance in the face amount thereof, or upon the net value thereof based upon the value of the assets of the said receivership, is more than sufficient in amount and value to pay the full amount of plaintiff's claim herein.

Wherefore, defendant denies the plaintiff's right to recover in this action.

Third Plea: For a further plea to said declaration, defendant says that the plaintiff, as Receiver, was and is indebted unto the defendant in the sum of $26,441.39, being the amount of balance on deposit belonging to the defendant in said bank at the time of the appointment of the receiver thereof and at the time of the alleged assessment for stock liability. Defendant further says that cash dividends totalling fifty per cent (50%) have been declared to depositors by said receiver whereby the defendant became and is entitled to receive from the plaintiff the sum of $13,220.69 in cash, with interest from the date of the said declarations of dividends. Defendant further says that the aforesaid amount has been demanded of the plaintiff by the defendant, but that said plaintiff has wholly refused to

pay the same. Defendant says that in violation of his said right to the aforesaid amount of dividends, said plaintiff has affirmatively asserted a legal right to set-off the said cash dividends, together with future dividends which said plaintiff will declare and said plaintiff has insisted upon his alleged right of set off for the purpose of setting off said dividends against the claim set forth in plaintiff's declaration and for the purpose of diminishing the same.

Defendant therefore says that the plaintiff's said refusal to deliver unto the defendant the aforesaid amount of cash dividends declared by the said plaintiff and payable to the depositors in said bank and in asserting said plaintiff's alleged right of set off as said receiver, that the said plaintiff is forever estopped to deny the right of this defendant to set off against the amount claimed in the plaintiff's declaration, the total amount of $26,441.39, being the balance on deposit of the said defendant with the plaintiff which said balance in the face amount thereof, or upon the net value thereof based upon the value of the assets of the said receivership, is more than sufficient in amount and value to pay the full amount of plaintiff's claim herein, and the defendant is willing that the said amount be set off against the plaintiff's demand.

Fourth Plea: For a further plea to said declaration, defendant says that the plaintiff, as Receiver, is fully indebted unto the defendant in the sum of $13,220.69, being the net amount of fifty per cent (50%) declared as cash dividends by the said Receiver upon the sum of $26,441.39, being the amount of said defendant's deposit in the said Commercial National Bank and the defendant therefore denies that the plaintiff is entitled to recover the full amount of the claim as set forth in the declaration herein but on the contrary says that the said defendant is entitled to a credit at this time in the full amount of the said cash dividend, together with such dividends as may hereafter be declared by the said Receiver. The defendant further denies each of the allegations of the said declaration not specifically admitted herein.

ALVIN L. NEWMYER,
Attorney for Defendant.

11 *Substituted Affidavit of Defense.*

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

I, Martin Roth, being first duly sworn on oath depose and say that I am the person named as defendant in the above entitled cause and I deny that I am indebted to the plaintiff, Robert C. Baldwin, Receiver of the Commercial National Bank of Washington, in the sum of $16,700, with interest, as claimed, or in any other sum whatsoever, but aver that I have a just defense to the said named plaintiff's entire claim by reason of the following facts: At the time of the appointment of the said Receiver for said Commercial National Bank I had on deposit in said bank in my name, exclusive of any indebtedness to said Commercial National Bank, the sum of $26,441.39 and the said plaintiff therein, as Receiver, acknowledged and accepted my proof of claim filed with him as said Receiver in the aforesaid amount. That thereafter the said Receiver declared a dividend of twenty per cent (20%) payable to depositors, by virtue of which fact I became and was entitled to receive from said Receiver the sum of $5,288.28 and that upon the declaration of said dividend, I made demand upon said Receiver for the payment of said amount of dividend, but the said Receiver refused to pay the same to me on the ground that I was indebted to him, by virtue of the stock assessment herein sued on and said Receiver thereby set-off, as against the dividend to which I was entitled, the sum claimed by him as owing by me on said stock assessment. That thereafter the said Receiver did further declare a dividend of thirty (30%) per cent, payable to depositors by virtue of which fact I became and was entitled to

12 receive from the said Receiver the total sum of $13,220.69, with interest from the date of said declarations of dividends; that I demanded the aforesaid amount from the plaintiff but said plaintiff wholly refused to pay the same and did assert a legal right of set-off to the said cash dividends, together with any further dividends which may be declared by the said Receiver, and I further say, upon information and belief, that the aforesaid amount of cash dividends declared by the said plain-

tiff and payable to me estops the said plaintiff from asserting his right to the full amount claimed in the said declaration but on the contrary say that I am entitled to recover from the plaintiff the full amount of my said deposit in the sum of $26,440.39 and further that I am entitled to a credit upon the amount sued for in the declaration in the sum of $13,220.69, being the amount of the aforesaid declaration of dividends.

Wherefore, I deny any indebtedness to the plaintiff.

MARTIN ROTH.

Subscribed and sworn to, before me, this 22nd day of November, 1933.

[NOTARIAL SEAL.] MARGARET MacPHERSON,
Notary Public, D. C.

Memorandum.

December 1, 1933.—Motion for Judgment under 73rd Rule filed.

13 Supreme Court of the District of Columbia.

Tuesday, February 20, 1934.

Session resumed pursuant to adjournment, Hon. Daniel W. O'Donoghue, Justice, presiding.

* * * * * * *

Upon consideration of the motion filed herein, for judgment under the 73rd rule, the same having been duly argued upon the 29th day of January, 1934, it is ordered that said motion be, and the same is hereby granted. Whereupon, it appearing to the Court that the full amount of the plaintiff's claim herein with interest up to 29th day of January, 1934, is in the sum of Seventeen Thousand Two Hundred Forty-eight Dollars and Forty-six Cents ($17,248.46), and it further appearing to the Court that the defendant is entitled to a credit on said amount claimed in the sum of Thirteen Thousand Two Hundred Twenty Dollars and Sixty-nine Cents ($13,220.69), it is ordered that judgment be, and the same is hereby entered herein in favor of the plaintiff in the sum of Four Thousand Twenty-seven Dollars and Seventy-seven Cents ($4,027.77), said sum being the differ-

ence between the full claim of the plaintiff and the credit of the defendant herein.

Wherefore, it is ordered that plaintiff recover of the defendant herein the sum of Four Thousand Twenty-seven Dollars and Seventy-seven Cents ($4,027.77) with interest thereon from January 29, 1934, together with costs of suit to be taxed by the clerk and have execution thereof.

14 *Memoranda.*

March 7, 1934.—Appeal noted from Judgment of February 20, 1934. Bond fixed at $100.00 or $50.00 cash.

March 12, 1934.—$50.00 deposited by Newmyer in lieu of appeal bond.

Assignment of Errors.

Filed March 16, 1934.

* * * * * * *

The defendant, Martin Roth, assigns as error committed by the trial court, the following:

1. The court erred in overruling the demurrer to the declaration.
2. The court erred in refusing to uphold the first amended plea.
3. The court erred in ruling that the defendant was not entitled to set off his deposits against the plaintiff's demand.
4. The court erred in ruling that the plaintiff's refusal to pay to the defendant the dividends declared upon defendant's deposit account did not estop the plaintiff from denying the defendant's right to set off the amount of his deposits against the plaintiff's demand.
5. The court erred in refusing to uphold the defendant's third plea of set off.
6. The court erred in ruling that the facts set forth in the defendant's substituted affidavit of defense did not constitute a good defense to the plaintiff's claim and in granting the plaintiff's motion for judgment under the 73rd Rule.

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Defendant.

15 Service of copy of Assignment of Errors and Designation of Record attached hereto, acknowledged this 16th day of March, 1934.

SHERLEY, FAUST & WILSON,
By CHARLES F. WILSON,
Attorneys for Plaintiff.

Designation of Record.

Filed March 16, 1934.

* * * * * * *

Now comes the defendant, Martin Roth, and designates the following to be included in the Transcript of Record upon the appeal in the above entitled cause, the following being considered sufficient for the determination of the questions raised on this appeal:

1. Declaration, Affidavit of Merit and Particulars of Demand filed June 27, 1933.

2. Memorandum: Demurrer to Declaration.

3. Memorandum: Demurrer to Declaration Overruled.

4. Amended Pleas and Substituted Affidavit of Defense filed November 23, 1933.

5. Memorandum: Plaintiff's Motion for Judgment under 73rd Rule.

6. Memorandum: Motion for Judgment granted February 20, 1934, in the sum of $4,027.77 with interest.

7. Memorandum: Defendant's election to stand on Amended Pleas and Substituted Affidavit of Defense.

8. Memorandum: Notation of Appeal and fixing of cost bond in the sum of $100 or in lieu thereof $50 cash.

9. Memorandum: Deposit of $50 cash for costs.

16 10. Assignment of Errors.

11. This Designation.

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Defendant.

Service of copy acknowledged this 16th day of March, 1934.

CHARLES F. WILSON.

17 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 16, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 82882 at Law, wherein Robert C. Baldwin, Receiver, Commercial National Bank of Washington, is Plaintiff and Martin Roth is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of May, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6230. Martin Roth, appellant, vs. Robert C. Baldwin, Receiver, Commercial National Bank of Washington. Court of Appeals, District of Columbia. Filed May 21, 1934. Henry W. Hodges, Clerk.

FOR MR. CHIEF JUSTICE MARTIN

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 1 - 1934

Stanley P. Rodgers
CLERK

IN THE

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1934

No. 6230

MARTIN ROTH,
Appellant,

vs.

ROBERT C. BALDWIN, *Receiver*
Commercial National Bank
of Washington,
Appellee.

BRIEF FOR APPELLANT

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Appellant.

Washington Daily Record, Printcraft Building

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IN THE

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1934

No. 6230

MARTIN ROTH,

Appellant,

vs.

ROBERT C. BALDWIN, *Receiver*
Commercial National Bank
of Washington,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF CASE

This is an appeal by the defendant below from a judgment for the appellee in the Supreme Court of

the District of Columbia in the sum of $4027.77, entered upon the granting of appellee's motion for judgment under Law Rule 73 in the court below.

For some time prior to March 29, 1933, the appellant was the owner of 167 shares of the capital stock of the Commercial National Bank of Washington, D. C., of the par value of $100 per share. On the said day the appellee, Receiver of the said bank, appointed February 28, 1933, was authorized by the Acting Comptroller of the Currency of the United States to proceed against stockholders of the said bank to enforce an assessment and requisition upon all stockholders, including the appellant and demand was thereupon made upon the appellant by the appellee to pay to him the sum of $16,700 with interest thereon from May 1, 1933. At the time of this demand and for some time prior thereto the appellant had funds on deposit in said bank in the sum of $26,441.39, which sum appellee acknowledged as the bank's indebtedness to the appellant. In the interim, between the time of the appointment of the appellee as receiver and the assessment by the Comptroller, the receiver declared two dividends to depositors, one for 20 per cent and the second in the sum of 30 per cent of deposits. Appellant had already filed his proof of claim in the sum of $26,441.39, being the amount of deposit to his credit at the time of the bank's closing. At the time of the declaration of each of the aforementioned dividends appellant made demand for his proportionate share, but payment of any dividend to him was refused upon the ground that the appellee elected to set off appellant's deposit against his potential double liability.

Upon the failure of the appellant to pay to the ap-

pellee the aforesaid assessment in the sum of $16,700, this action against the appellant was instituted in the court below on June 27, 1933. (R. 1) Appellant's demurrer to the declaration, predicated upon several grounds, was overruled. (R. 7) Appellant subsequently filed four amended pleas (R. 7) supported by his substituted affidavit of defense. (R. 10) Appellee then filed a motion for judgment under the 73rd Rule, which was granted (R. 11) and judgment entered for appellee in the sum of $4027.77, being the difference between $16,700 (assessment upon stock) with interest and the sum of $13,220.69, being 50 per cent declared dividend to general creditors without interest upon the appellant's deposit balance in the said bank in the sum of $26,441.39. From this judgment appellant noted his appeal to this court.

ASSIGNMENT OF ERRORS

The appellant assigns as error committed by the trial court, the following: (R. 12)

1. The court erred in overruling the demurrer to the declaration.
2. The court erred in refusing to uphold the first amended plea.
3. The court erred in ruling that the defendant was not entitled to set off his deposits against the plaintiff's demand.
4. The court erred in ruling that the plaintiff's refusal to pay to the defendant the dividends

declared upon defendant's deposit account did not estop the plaintiff from denying the defendant's right to set off the amount of his deposits against the plaintiff's demand.

5. The court erred in refusing to uphold the defendant's third plea of set off.

6. The court erred in ruling that the facts set forth in the defendant's substituted affidavit of defense did not constitute a good defense to the planitiff's claim and in granting the plaintiff's motion for judgment under the 73rd Rule.

ARGUMENT

I

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE DECLARATION.

(a) AS TO AUTHORITY

The declaration alleged that "the plaintiff on the 28th day of February, 1933, was duly appointed Receiver of the said Commercial National Bank of Washington by the Acting Comptroller of the Currency of the United States, under the authority vested in said Acting Comptroller by the statutes of the United States . . . the Acting Comptroller of the Currency determined that in order to pay the debts of said Commercial National Bank it was necessary

to enforce the individual liability of the stockholders therefor . . ."

The demurrer to the declaration was overruled. Without exception taken by the appellant to this ruling, it is nevertheless properly reviewable by this court by virtue of Title 24, Section 8 of the Code of Laws for the District of Columbia (1929), where it is provided that pleading after the overruling of a demurrer will not constitute a waiver of the demurrer "and upon appeal shall have the right to insist upon his demurrer and have the benefit thereof, as fully as if he had not pleaded over."

The office of the Comptroller of the Currency as defined by R. S. Sec. 324, Dec. 23, 1913, C 6, Sec. 10, 38 Stat. 261, provides that the duties of the office are to be performed under the general directions of the Secretary of the Treasury and R. S. Sec. 327 provides for a Deputy Comptroller, but no provision is made for any office or officer as the "Acting" Comptroller, as alleged in the declaration. The declaration further fails to allege the powers of the alleged Acting Comptroller of the Currency but proceeds upon the assumption that he is possessed of the same powers and duties possessed by the Comptroller, for whom provision is made in the statutes. Without express power given to such an official to determine in his discretion the necessity for an assessment of additional liability upon the appellant and other stockholders of the said bank, the declaration must fail for the reason that no official authority is possessed by such titled officer to either determine the necessity of assessment or to direct the Receiver to proceed at law to enforce such assessments.

It is submitted that in an action of this nature, where the imposition of additional liabilities upon stockholders in national banks rests largely within the discretion of the Comptroller and where the determination of the fact of necessity is made by one other than the Comptroller, it is essential that the declaration allege with certainty the relationship of the new or substituted officer so that his authority to proceed may be examined in the statute.

The fact that in *Keyser vs. Hitz,* 133 U. S. 138, 33 L. ed. 531, the court held that a certificate executed by the Acting Comptroller of the Currency was admissible in evidence as coming from the Comptroller's Office, does not conclude the question in the case at bar which is one pleading and not evidence. Although the court will take judicial notice of the United States Statutes and thereby not require their being pleaded, yet the existence of such an officer is primarily one of fact whose authority and even existence cannot be noticed judicially, where no express provision is made for him by statute.

(b) AS TO INSOLVENCY

An adjudication of the insolvency of the bank was necessary before the additional liability of stockholders could be enforced. The federal courts have repeatedly held that such an adjudication is a condition precedent to the double liability of stockholders. In *Page vs. Jones,* 7 F. (2d) 541 (cert. den. 269 U. S. 587), in an opinion by Judge Sanborn, it was said:

"Indispensable conditions precedent to the enforcement of such liability are: First, the adjudication of

the Comptroller of the insolvency of the bank and that it is in liquidation, and, second, the adjudication and order of the assessment or requisition on the stockholders of the bank under Sec. 9689."

Kennedy vs. Gibson, 8 Wall 498, 19 L. ed. 476.
U. S. vs. Knox, 102 U. S. 425, 26 L. ed. 216.
Bank vs. Case, 99 U. S. 628, 25 L. ed. 448.
Casey vs. Galli, 94 U. S. 673, 24 L. ed 168.
Bushmell vs. Leland, 164 U. S. 684, 41 L. ed. 598.

The declaration fails to allege that the bank was insolvent and for this reason the declaration is defective. Had it so alleged it is conceded that the denial of insolvency as a fact could not be raised as a defense, since the Comptroller's decision as to solvency would be judicial in character and conclusive upon stockholders. But where, as in the case at bar, there has been no adjudication as to insolvency and the declaration fails to allege either the fact of insolvency or that the Comptroller has determined that the bank is insolvent, a cause of action is not stated. As stated by Judge Sanborn in *Page vs. Jones,* supra, insolvency is an "indispensable condition precedent to the enforcement of such liability."

It is respectfully submitted that the declaration herein is defective in each of the foregoing particulars and the appellant's demurrer thereto should have been sustained.

II

THE COURT ERRED IN GRANTING APPELLEE'S MOTION FOR JUDGMENT

(a) *Appellee's Set Off*

The appellant's substituted affidavit of defense (R 10) substantially avers that when the appellee receiver was appointed receiver of the bank, appellant had on deposit $26,441.39 and the said receiver did acknowledge this indebtedness and accepted appellant's proof of claim in that amount; that thereafter the appellee declared a 20 per cent dividend to creditors, including general depositors and appellant immediately became entitled to the sum of $5288.28, which sum he demanded but which appellee refused to pay on the ground that appellant was indebted to the receiver upon his superadded stock liability. The receiver thereupon notified appellant that he would set off the bank's indebtedness against appellant's stock assessment liability; that thereafter a further dividend in the sum of 30 per cent was declared and appellee again refused to pay the same to appellant and renewed his legal right to set off to the extent of 50 per cent of appellant's deposit account. Appellant, in his affidavit, therefore, denied further liability to the receiver and in accord with the receiver's alleged election to set off, claimed a balance due and owing to the appellant.

It is established law that in order to invoke the principle of set off claims must be mutual debts and credits and the parties must bear a mutual relation to each

other. As applied to banking, it is established that one who is both a debtor and a creditor of a bank has the right to set off one claim against the other and either participate in or be liable to the bank for the difference, as it may result in either a debit or credit balance.

In *Scott vs. Armstrong,* 146 U. S. 499, 36 L. ed. 1059, the court held that upon the insolvency of a national bank where its assets pass into the hands of a receiver appointed by the Comptroller of the Currency, a debtor of the bank can set off against his indebtedness the amount of a claim he holds against the bank if the debt due from the bank was payable at the time of its suspension and the debt due to the bank was payable at a time subsequent thereto.

In bank stock assessment cases it has been held by some courts that a deposit balance cannot, at the instance of the depositor, be set off against his assessment liability.

The few federal cases in which this principal has been announced have predicated their decisions upon the ground that the additional liability upon stockholders of national banks constitutes a trust fund for the payment of creditors and the defense, being equitable in character cannot be interposed in actions at law. In each of these cases the set off was attempted by the stockholder creditor.

Platt vs. Larter, 94 F. 610.
Cressey vs. Morrill, 125 F. 878.
Anglo-American Lard Co. vs. Lombard, 132 F. 721.

By virtue of Sec. 1535-C of the District of Columbia

Code (1925) (Title 24 Sec. 13, D. C. Code 1929), equitable defenses may now be interposed. An exception to the general rule of set off should apply even though the debts do not arise out of the same right since the court will take cognizance of cross claims between litigants, though wanting in technical mutuality and set off one against the other whenever it becomes necessary to effect a clear equity. In the case at bar the receiver has affirmatively asserted his legal right of set off and appellant's affidavit of defense is partially predicated upon the full performance of this assertion of legal right.

(b) *Appellant's Set Off*

Notwithstanding that debts may be of a different character and mutuality of parties may be lacking, the court in *Wells vs. Stout,* 38 F. 807, permitted a set off.

If a stockholder's superadded liability is sought to be enforced by a creditor of the insolvent bank, the courts generally hold that the stockholder may set off a debt owing to him by the corporation in a suit by a creditor to enforce the stockholder's statutory liability.

In *Fidelity Insurance Trust Company vs. Mechanics Savings Bank,* 97 F. 297, the court, through Circuit Judge Acheson, said:

> "In 1 *Cook, Stock, Stockholders and Corp. Law, Sec.* 225, it is said:
>
> 'It has been held that, where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholders cannot set off

> an indebtedness of the corporation to him. He must pay in what the statute requires, and then prove his claim against the corporation like any other creditor. But when the shareholder's liability by statute is immediate and personal and several, and any creditor may owe any shareholder, then a shareholder may set off a debt owing to him from the corporation, when he is sued by a corporate creditor.'
>
> The doctrine thus laid down by these law writers is well sustained by their citations of adjudged cases. The rule above stated commends itself as manifestly just. Its applicability here is apparent, for under the law of Kansas the statutory double liability is not impressed with any trust for the benefit of the creditors ratably, but the liability imposed upon the stockholders is immediate and personal and several and of such nature that any creditor may institute an independent action in his own right, exclusively, against any stockholder."

In this regard it is significant to note that the statutes comprising the National Banking Law use similar language and permit an action to be instituted by individual creditors against individual stockholders and do not provide that such liability is impressed with a trust. The liability of stockholders is no longer ratable but individual and immediate. Particularly, R. S. 5151 which originally provided for liability of stockholders, "equally and ratably," was repealed by 8 Stat. 273, Dec. 23, 1913, 12 U. S. C. A. Sec. 64, which provided that "the stockholders of every national banking association shall be held individually responsible." (See 12 U. S. C. A., page 112.)

In further support of the total failure of any statu-

tory provision impressing a trust upon this type of claim, 19 Stat. 63, June 30, 1876, 156, 12 U. S. C. A. Sec. 65, provides that creditors are permitted to enforce the individual liability of shareholders: ". . . the individual liability of the shareholders provided for by Sec. 63 of this title may be enforced by any creditor of such association . . . brought by such creditor on behalf of himself and of all other creditors . . ."

There is no real distinction in principle to be drawn between an action for the enforcement of stockholders' superadded liability by a Receiver appointed by the Comptroller or by a creditor for his benefit and for the benefit of other creditors. The latter partakes of the character of representative suits as much as does the former. The liability of the stockholder is not to be materially varied by the form of remedy sought to impose his superadded liability.

Under the National Banking Law it is submitted that the liability imposed on stockholders is personal and several and any creditor may institute an independent action against any stockholder for the enforcement of corporate debts.- In *Abbey vs. Long,* 24 P. 1111, relied upon by Circuit Judge Acheson in the Mechanics Savings Bank case, supra, the court said:

> "Where the statute creates a liability against stockholders which is personal and several and actionable by any creditor against any stockholder, it is generally held that a stockholder may, in such proceeding, brought against himself, set off debts due to him from the company."

The United States Supreme Court refused to grant

certiorari in the Mechanics Savings Bank case, 176 U. S. 682, 44 L. ed. 637.

Broadway Nat'l Bank vs. Baker, 176 Mass. 294, 57 N. E. 603.

In *Sargent vs. Stetson,* 161 Mass. 371, 63 N. E. 929, it was said that the defense relied upon was not technically a set off, but a condition which equitably ought to relieve a defendant from his superadded liability as a stockholder, either when he holds a debt against a corporation, which he bought in good faith at its face value, or when he has paid such debt for the benefit of the corporation.

An indebtedness of an insolvent corporation was allowed to be set off as an equitable defense against the stockholder's liability in *Cahill vs. Original, etc. Asso.,* 94 Md. 353, 50 A. 1044.

Straw & E. Mfg. Co. vs. Kilbourne Boot and Shoe Co., 80 Minn. 125, 83 N. W. 36.

In New York the set off has been permitted as an equitable defense.

Re Empire City Bank, 18 N.Y. 199, 8 Abb. Pr. 192.

Mathez vs. Neidig, 82 N.Y. 100.

The liability created by the statute imposing a double liability upon stockholders of national banks constitutes a fund which any creditor of the company may reach and if a stockholder who is sued is himself a creditor to an amount equal to a statutory liability,

he has a good right—or even better right as he has it already in his possession—as the party suing for creditors, and it would be inequitable to take it from him for the benefit of other creditors whose equity is no greater than his.

Appellant, therefore, was entitled to have his acknowledged proof of claim set off against his stock liability and as to any surplus remaining to his credit after such application was entitled to pro rata distribution with general creditors to the extent of such balance.

(c) *As to Interest*

No interest was allowed, in entering the judgment, for the overdue payments of dividends to which the appellant was entitled. In entering the judgment the court allowed interest on the stock assessment from the date of demand and subtracted therefrom as a credit thereon the net 50 per cent dividends declared on deposit, which were long overdue and which appellee refused to pay to appellant by asserting his set off. It is submitted that the court erred in not allowing as a credit the interest on the 50 per cent dividends from the time that they became payable to the time of the entry of the judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below not only erred in overruling appellant's demurrer to the declaration but in refus-

ing to uphold the equitable set off to which the appellant was entitled, as shown by the authorities and reasons relied upon herein. It is, therefore, respectfully submitted that the judgment of the trial court be reversed.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS FOR TH
DISTRICT OF COLUMBIA

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Henry W. Hodges
CLERK

IN THE

United States Court of Appeals for the District of Columbia

MARTIN ROTH,
Appellant,

v.

ROBERT C. BALDWIN, Receiver, Commercial National Bank of Washington,
Appellee.

No. 6230

BRIEF FOR APPELLEE

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No. 6230

BRIEF FOR APPELLEE

STATEMENT OF FACTS

This is an appeal by the defendant in the court below from a judgment rendered under the 73rd Rule of that court against him in favor of the appellee, for the sum of $4,027.77.

Appellee, plaintiff in the court below, as Receiver of the Commercial National Bank of Washington, filed suit against the appellant to recover the sum of $16,700, on the ground that appellant was the owner of 167 shares of the capital stock of the Commercial National Bank of Washington, registered in his name on the books of said bank, of the par value of $100

per share; that the Acting Comptroller of the Currency had levied an assessment against each shareholder, including appellant, of which assessment appellant was duly notified and payment demanded of him in accordance with the statutes and refused.

The appellant demurred to the declaration on the ground that it did not disclose the authority of the Acting Comptroller to make the assessment, which demurrer was overruled (R. 7).

Appellant then filed two pleas, to which the appellee demurred, which demurrer was sustained by the Court.

Appellant then filed four amended pleas, together with what he termed a substituted affidavit of defense (R. 7). The defense set up in this affidavit was based upon set-off and estoppel and alleged that the appellee as Receiver was justly indebted unto appellant in the sum of $26,441.39, the amount of balance on deposit to the credit of appellant in said bank at the time of the appointment of said Receiver.

Appellee then filed a motion for judgment under the 73rd Rule, which was granted (R. 11) and judgment entered in the sum of $4,027.77, being the difference between $16,700, the amount sued for in the declaration, with interest, and the sum of $13,220.69, being the total amount of two dividends representing fifty per cent of the amount appellant had on deposit in said bank. From this judgment the defendant below has appealed to this Court.

ARGUMENT

I. THE ACTING COMPTROLLER OF THE CURRENCY WAS AUTHORIZED UNDER THE LAW TO MAKE THE ASSESSMENT AND TO DIRECT THE RECEIVER TO TAKE THE PROCEEDINGS NECESSARY TO ENFORCE THE INDIVIDUAL LIABILITY OF THE STOCKHOLDERS.

In the court below the appellant, in support of his demurrer to the declaration, contended that the declaration failed to allege the power of the Acting Comptroller of the Currency of the United States to make the assessment, contending that the statute makes no mention of the office of the Acting Comptroller of the Currency and that the action of the Acting Comptroller must be shown to be by direction of the Comptroller or the Deputy Comptroller. In other words, he challenged the right of the Acting Comptroller to make the assessment and to direct the Receiver to take the proceedings necessary to enforce the individual liability of the shareholders.

In this case the Deputy Comptroller was acting as Comptroller, and the Court will take judicial notice of the fact, as specifically held in *Keyser* v. *Hitz*, 133 U. S. 138. The office of Deputy Comptroller is created by statute and he by the terms of the statute "shall possess the power and perform the duties attached by law to the office of the Comptroller during a vacancy in the office or during the absence or inability of the Comptroller." (Sec. 4, Title 12, U. S. C. A.)

The Deputy Comptroller having designated himself as *Acting* Comptroller in the "Assessment upon Shareholders," copy of which was attached to and made a part of the declaration as particulars of demand, it must by force of the language used be presumed that the office of the Comptroller was vacant or that the Comptroller was absent or suffering from disability. *Young* v. *Wempe*, 46 Fed. 354.

We submit that the authority of the Acting Comptroller of the Currency cannot be questioned when the declaration is read in the light of the statutory law and the fact that he was Deputy Comptroller, of both of which facts the Court takes judicial notice.

This question was raised in *Keyser* v. *Hitz, supra,* where the contention was made that the bank could not acquire the powers of a national banking association before receiving from the Comptroller of the Currency a certificate that the provisions of the statute relating to such associations had been complied with, and that the certificate theretofore given was signed by the *Acting* Comptroller and therefore did not meet the requirements of the statute because there was no such officer known to the law. The Supreme Court in its opinion said:

> "This point was not specifically made in the court below. But there is nothing of substance in it, even if it could properly be raised in this collateral proceeding. There is an officer designated a deputy comptroller of the currency, who may exercise the powers and discharge the duties attached to the office of comptroller, during a vacancy in that office, or during the absence or

inability of the comptroller. R. S. sections 178, 327. The certificate alluded to was from the office of the comptroller, and was under the seal of that office. Besides, this court takes judicial notice of the fact that Mr. Langworthy was, at the date of his certificate, deputy comptroller of the currency. And it will be assumed that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller, and was, therefore, at the time acting comptroller."

To the same effect are:

Young v. *Wempe, supra;*
Simmons v. *Freeman*, 146 Ga. 118;
Weitzel v. *Brown*, 224 Mass. 190;
Davis Estate v. *Watkins*, 56 Neb. 288.

The appellant cites not a single authority in support of his contention.

II. THE DECLARATION IS NOT DEFECTIVE, AS IT ALLEGES AN ADJUDICATION BY THE COMPTROLLER OF THE CURRENCY THAT AN ASSESSMENT WAS NECESSARY.

Appellant in his brief contends that the declaration in this case was defective for the reason that it did not allege in specific terms that the bank was insolvent, but cites no case which sustains any such contention.

The authorities, from the case of *Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. Ed. 476 (decided in 1869), have uniformly held that what the declaration must

show is that the Comptroller did make an adjudication that an assessment was necessary.

In *Kennedy v. Gibson, supra*, the bill had specifically alleged the insolvency of the bank, but contained no averment of any action by the Comptroller touching the personal liability of the stockholders. Such an omission was manifestly fatal, because it is settled beyond question that there must be an adjudication by the Comptroller before any action is brought against stockholders to enforce their individual liability. In its opinion the Court said:

> "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases and if put in issue must be proved."

It will be seen that what the Court decided in this case was that it was indispensable that the Comptroller must decide when it is necessary to institute proceedings against the stockholders to enforce their present liability and such action on his part must be averred in the declaration.

The ruling in *Kennedy* v. *Gibson* has been followed and cited in many subsequent cases and so far as investigation shows has never been departed from and is the law today.

In the present case the Comptroller did decide that it was necessary to institute proceedings against the stockholders to enforce their individual liability and that fact is distinctly averred in the declaration which states:

> "*And for that, on the 25th day of March, 1933, the Acting Comptroller of the Currency determined that in order to pay the debts of said Commercial National Bank it was necessary to enforce the individual liability of the stockholders therefor*, and by virtue of the authority vested in him by law, the said Acting Comptroller of the Currency on said date last named made an assessment and requisition upon all of the shareholders of record of the said Commercial National Bank of Washington for the sum of One Million ($1,000,000) Dollars, that amount constituting an assessment of one hundred (100%) per cent of the par value of all of the shares of the capital stock of said bank, to be paid by said shareholders on or before the 1st day of May, 1933; and at the same time the said Acting Comptroller of the Currency made demand upon each and every one of the shareholders of said Commercial National Bank of Washington for the payment of a sum equal to the par value of each and every share of the capital stock of said Commercial National Bank of Washington, held or owned by them respectively at the time of the failure of said bank, and directed the plaintiff as Receiver of said bank to take all necessary proceed-

ings, by suit or otherwise, to enforce to that extent said individual liability of said shareholders."

Furthermore, in *Young* v. *Wempe, supra*, the court held that in an action by the receiver of a national bank against the stockholders to collect an assessment made by the Comptroller, the complaint need only allege that the Comptroller determined that the assessment was necessary and levied it, since such an assessment is conclusive against the stockholders, citing *Kennedy* v. *Gibson, supra*, and other authorities. This same ruling was also made in the recent case of *Rogers* v. *Jarden*, 3 Fed. Supp. 211.

In the case of *Welles* v. *Stout*, 38 Fed. 67, the court held that in an action by the receiver of a national bank against a shareholder to recover an assessment ordered by the Comptroller, an allegation in the petition that on a day named "the comptroller of the currency, in order to pay the liabilities of" the bank, "made an assessment upon all the said shares of the capital stock of said" bank of 100 per cent upon its par value, "and ordered the stockholders to pay the same on or before" a day named, is sufficient to show that the requisite action was had by the comptroller, not only as to determining upon the necessity of an assessment, but also as to the enforcement thereof by suit against the delinquent stockholders.

A reading of the authorities cited by appellant in support of his contention that the declaration was defective because it did not specifically allege that the bank was insolvent, will show that not a single one of them sustains any such contention.

For instance, in the case of *Page* v. *Jones*, 7 Fed. (2) 541, the defendant resisted the collection of an assessment against him by the Comptroller on the ground that he had already paid an assessment to aid the bank while it was in the hands of a prior receiver, but the court held this defense unsound for the reason that when he paid such assesment there had been no adjudication of insolvency, or of a state of liquidation, and no assessment had been adjudged or made by the Comptroller and therefore that any payment that he had made had been voluntary and could not be pleaded as a defense to a subsequent valid assessment by the Comptroller.

III. The Plea of Set-off and Estoppel Is Not a Good Defense in this Case.

The appellant in his affidavit filed in support of his pleas claimed the right to set off against the appellee's claim for assessment against him as a stockholder of the bank the entire amount which the appellant had on deposit at the time the bank was closed. This the law does not permit him to do, as has been settled for many years by the uniform decisions of the courts, and is therefore no longer open to question.

As far back as 1881 the United States District Court for the District of New Jersey, in the case of *Hobart* v. *Gould*, 8 Fed. 57, held that a stockholder of a national bank who happens also to be one of its creditors cannot cancel or diminish the assessment to which Section 5151 makes him liable by offsetting

his individual claim against it. In that case the court said:

> "The third plea, to which the plaintiff has demurred generally, sets forth that the First National Bank of Newark, of which the plaintiff is receiver, is indebted to the defendant in large sums of money, which exceed the damages sustained by the plaintiff by reason, etc., out of which sum the defendant is ready and willing, and offers, to set off and allow the full amount of the damages claimed.
>
> "The demurrer raises the question whether such set-off is allowable; i.e., whether a stockholder of a national bank, who happens also to be a creditor, may cancel or diminish his assessment by off setting his individual claim against the association.
>
> "Considering the ends plainly in contemplation by the foregoing provisions of the statute, it would seem, upon principle, that no such escape from liability should be permitted by the shareholder. The object of the act was to make the holders of the stock responsible for a trust fund, equal, if necessary, to the amount of the capital of the bank, and to be devoted to the payment of all creditors alike. If the receiver, in his appeals to the shareholders for the payment of the assessments against them, may be met by their claims as creditors of the association, it is not difficult to imagine cases in which the beneficent object of the law might be wholly defeated. Besides, the right to a set-off in pleading is a creature of the statute, and applies only to mutual dealings, and no such relations exist between the parties here. The liability to be enforced against the shareholder is not a debt due to the bank, but

is a sum of money equal to the par value of his stock, payable by him to the receiver as an officer of the government by force of the law, and the assessment authorized and made by the comptroller. The effect of allowing such a set-off is to give the shareholder an advantage over other creditors. It practically pays his debt in full, and, by leaving so much less for others, diminishes his liability as a stockholder, which it was clearly the design of the law to impose."

The ruling in *Hobart* v. *Gould, supra*, was followed by the Circuit Court of Appeals for the Ninth Circuit in the case of *Wingate* v. *Orchard*, 75 Fed. 240, in which the court in its opinion said:

"For similar reasons, neither can the individual claim of the stockholder against the bank for moneys deposited by him therein be offset against his responsibility to all of the creditors secured by Section 5151. See, also, *Hobart* v. *Gould*, 8 Fed. 57, and cases there cited. The judgment of the court below, of May 22, 1895, allowing the set-off in question, is accordingly reversed."

In the leading textbook on this subject, Morse on Banks and Banking (6th Ed.) Sec. 338, p. 788, the same rule is stated as follows:

"A stockholder is not entitled to set off against an assessment on his stock the amount of his individual claim against the bank;"

citing *Williams* v. *Rose*, 218 Fed. 898, and many other cases. In the latter case, the court in its opinion, page 901, said:

"Upon the second question, in the absence of a controlling decision by a higher court, my view is that a stockholder is not entitled to set-off against an assessment made against him pursuant to the Revised Statutes of the United States, where a bank had become insolvent, the amount of his individual claim against the bank. The reasoning of the Circuit Court of Appeals of the Ninth Circuit in *Wingate* v. *Orchard*, 75 Fed. 241, 21 C. C. A. 315, covers this branch of the present case. The court there put its decision upon the ground that the fund provided for under the Revised Statutes was not intended for any particular creditor, but to make good all debts equally and without any preference, and that in the event of the winding up of the affairs of a national bank the fund provided by Sections 5226 and 5227 was for the express purpose of making good the contracts, debts, and engagements, and is manifestly a trust fund, to a pro rata share of which all creditors are equally and equitably entitled. The court distinguished the case of *Scott* v. *Armstrong,* 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, and cited in support of the conclusion reached *Delano* v. *Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260. In the latter case the Supreme Court of the United States treated an assessment under Section 5151 as made by authority of the Comptroller of the Currency, not as a voluntary one, and as only to be applied to the satisfaction of the creditors, equally and ratably. *Scovill* v. *Thayer,* 105 U. S. 143, 26 L. Ed. 968."

The authorities nearly all hold that where one is a creditor as well as a stockholder of a bank he cannot avail himself of the debt owing to him by the bank,

such as a deposit, by way of set-off to diminish his contributory share. His liability as a contributor for the benefit of creditors is distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions. In the latter case, he is entitled to the right of set-off.

Not only the Federal Courts but the State courts follow this rule. See *Hughes* v. *Marvin*, 216 Ky. 190; *Barth* v. *Pack*, 51 Mont. 418.

The defendant further contended in the Court below that the fact that the plaintiff by refusing to pay to him the accrued dividend on his bank deposit, but to hold the same as a set-off to be applied on account of the amount owing by defendant on his stock assessment estops the plaintiff as Receiver from denying the right of defendant to set-off against said stock assessment the entire sum which defendant had on deposit in the bank at the time of the appointment of the plaintiff as Receiver. It is hard to see how the doctrine of estoppel has any application to this matter whatsoever and as appellant does not even refer to it in his brief, we assume that this defense has been abandoned and we will make no further reference to it.

As we read the brief of appellant, he thinks an exception to the general rule that a stockholder is not entitled to set-off against an assessment made against him his individual claim against the bank, should apply in this case by virtue of Section 1535-C of the District of Columbia Code, 1925 (Title 24, Section 13, D. C. Code 1929), which provides that equitable defenses may be pleaded in actions at law. Appel-

lant says that the few federal cases in which this principle (the general rule) has been announced have predicated their decision upon the ground that the additional liability upon stockholders of national banks constitutes a trust fund for the payment of creditors and the defense being equitable in character cannot be interposed in actions at law. In other words, he contends that it is a matter of pleading and in support of this statement cites three federal cases. However, an examination of these cases shows that all of them pertain to corporations created under the law of Kansas and have no reference to national banks or stockholders thereof. The State cases which appellant also cites have reference to the liability of stockholders of corporations generally incorporated under various State laws.

When we read that the courts have based their decisions on the ground that to allow a set-off to a stockholder would be to give the shareholder an advantage over other creditors and practically pay his debt in full, leaving so much less for others, and that the assessment was to found a trust fund to make good all debts equally and without preference, it is difficult to see how the contention can seriously be made that such decisions have been made on questions of pleading and not of substantive law.

For the foregoing reasons we submit that the ruling of the court below was correct and that the judgment should be affirmed.

Respectfully sumbitted,

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